No. 94-1953

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In the Supreme Court of the United States

OCTOBER TERM, 1995

STEAMSHIP CLERKS UNION, LOCAL 1066, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the finding that petitioner's policy and practice of restricting union membership to close relatives of current and former members, all of whom are white, constituted disparate impact discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A35) is reported at 48 F.3d 594. The district court's opinion (Pet. App. A36-A45) is reported at 850 F. Supp. 74.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1995. The petition for a writ of certiorari was filed on May 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a labor union engaged in an industry affecting commerce and is thus covered by the prohibition against racial discrimination in employment practices contained in Title VII of the Civil Rights Act of 1964. 42 U.S.C. 2000e-2 *et seq.*[1] Petitioner has a collective bargaining agreement with the Boston Shipping Association guaranteeing petitioner's members priority in employment as cargo clerks for stevedoring companies in Boston-area harbors. Pet. App. A37, A39. Cargo clerks check cargo against lists during the loading and unloading of cargo vessels. *Id.* at A3. The only formal requirement for obtaining employment as a cargo clerk is the ability to read and write English and perform simple arithmetic. *Id.* at A38.

None of petitioner's current members are black or Hispanic, nor has petitioner had a black or Hispanic member since at least 1967. Pet. App. A40. Blacks and Hispanics constituted 21% and 6%, respectively, of the available labor market in the Boston area during the relevant period. *Id.* at A4, A42. Seven percent of the persons employed in clerical positions in the transportation and public utilities industries in the Boston area were black, and one percent were Hispanic during the period. *Id.* at A42 n.26.

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[1] Title VII provides in relevant part:

> It shall be an unlawful employment practice for a labor organization * * * to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin.

42 U.S.C. 2000e-2(c)(1).

Petitioner admits new members only if they are sponsored by current members. Pet. App. A39. It has been the consistent practice and policy of petitioner's members to sponsor only persons who are members of their immediate families. *Id.* at A4, A39-A40. Petitioner admitted at least 27 new members during the 1970s, all of them white, and at least 30 new members between 1980 and 1986, all of them white. *Id.* at A4; C.A. App. 38, 130-131. Except for one person admitted pursuant to court order, all the other new members were sponsored by (or replaced) an immediate relative. Pet. App. A39-A40 & n.24.

2. After conducting an investigation and instituting administrative proceedings, respondent Equal Employment Opportunity Commission (Commission) filed suit against petitioner, alleging that petitioner had discriminated against blacks and Hispanics on the basis of race and national origin in the employment of steamship clerks, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(c).[2]

The district court granted the Commission's motion for summary judgment with regard to liability. The court found that the Commission had established a prima facie case by showing that petitioner's restriction of its membership to member-referred applicants had a significantly disparate and adverse impact on blacks and Hispanics. Pet. App. A40-A45. The

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[2] The Commission also named as a defendant a stevedoring firm which was a member of the Boston Shipping Association, regularly employed steamship clerks referred by the union, and rarely employed nonmembers of the union. Pet. App. A4, A39. The firm is reportedly defunct and did not appeal from the district court judgment. Pet. 1 n.1; Pet. App. A4 n.1. The court of appeals treated petitioner as the sole defendant, *ibid.*, as do we.

court noted that prior training and specialized skills are not required to perform steamship clerk tasks, reviewed the size of the relevant labor pools of blacks and Hispanics, and concluded that chance was not a likely explanation for the fact that petitioner's policy had never produced a black or Hispanic member. *Id.* at A41-A43, citing *Fudge* v. *City of Providence Fire Dept.*, 766 F.2d 650, 658 (1st Cir. 1985).

The court found that petitioner failed to articulate a legitimate business justification for the challenged practice. Pet. App. A43-A45. The court stated that petitioner's purported justification for its membership policy is that "[m]ost recently inducted members have joined the [u]nion for non-economic reasons such as continuing a family tradition of membership." *Id.* at A43. The court observed that this is not a rationale for the membership policy, but rather an explanation of the motives of those who benefited from the policy. The court found that petitioner's justification "does not explain, much less justify, the nexus between family tradition and the job of steamship clerk, or the union's motivation in attempting to perpetuate that connection," since "Title VII case law has from the beginning made clear that nepotistic concerns cannot supersede the nation's paramount goal of equal economic opportunity for all." *Id.* at A44, quoting *Bonilla* v. *Oakland Scavenger Co.*, 697 F.2d 1297, 1303 (9th Cir. 1982), cert. denied, 467 U.S. 1251 (1984).

The court entered summary judgment for petitioner on a separate claim regarding record-keeping on which the Commission did not produce supporting evidence. Pet. App. A44.[3] Approximately two weeks after entry

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[3] The Commission did not appeal from this portion of the judgment. Pet. App. A6 n.4.

of the partial summary judgment orders, the court entered a judgment, without soliciting input from the parties, that directed petitioner to take certain remedial action. *Id.* at A46-A48; see *id.* at A6.

3. The court of appeals affirmed the holding that petitioner violated Title VII because its sponsorship-based membership policy constituted disparate impact discrimination. Pet. App. A15.[4] The court reviewed the relevant labor pool data indicating that the combined pool of potential black and Hispanic applicants for union membership ranged between 8% and 27% and focused on the six-year period from 1980 through 1986 during which petitioner admitted 30 new members, all of whom were white. *Id.* at A16-A17. The court rejected petitioner's arguments that the small sample size and the lack of sophisticated statistical analysis precluded the district court from finding a violation. *Id.* at A16-A19, A23-A24. It found that petitioner did not present sufficient evidence to create a question of fact regarding the impact of the policy and petitioner failed to show why an inference of disparate impact was inappropriate. The court found that the district court did not err in "considering the available statistical evidence, and drawing founded inferences from it, en route to a disparate impact determination," especially given that the claim "nestles in a singularly compelling factual context," i.e., nepotism by an all-white group. *Id.* at A18, A19. Although more sophisticated statistical analysis would have been helpful, its absence did not undermine the court's finding that the

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[4] Because the court found disparate impact discrimination, it did not address the Commission's parallel charge of intentional discrimination. Pet. App. A4-A5 n.2.

membership policy caused the exclusion of minorities from the union between 1980 and 1986. *Id.* at A19.[5]

The court also rejected petitioner's argument that the Commission had not established a prima facie case concerning causation because it did not identify particular blacks or Hispanics who unsuccessfully sought union membership. The court found the district court's conclusion "irresistible" in the context of this case, notwithstanding the failure to identify a specific unsuccessful minority applicant, because of

> the unvarnished reality of the situation—a sponsorship-based membership policy, enacted by an all-white union, and a six-year track record of zero minority members despite 30 new white members, all of whom had family ties to existing members.

Pet. App. A21. The court also emphasized that rejection of actual applicants is not always necessary to prove causation. *Id.* at A22, citing *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977) (disavowing any rule "that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants"); *United States* v. *Sheet Metal Workers Int'l Ass'n, Local Union No. 36*, 416 F.2d 123, 127 (8th Cir. 1969); 1 C. Sullivan, M. Zimmer & R. Richards, *Employment Discrimination* § 4.3.1, at 186 (2d ed. 1988). The court concluded that

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[5] The court noted that petitioner did not dispute the facts alleged by the Commission, but only challenged their ultimate legal significance. Therefore, the court of appeals considered the case submitted on the record and subjected the inferences drawn by the district court to clear-error review. Pet. App. A14-A15, citing *Federacion de Empleados del Tribunal Gen. de Justicia* v. *Torres*, 747 F.2d 35, 36 (1st Cir. 1984) (Breyer, J.).

causation could be inferred in this case because the sponsorship policy itself would have discouraged potential minority applicants. Pet. App. A22, quoting *Dothard*, 433 U.S. at 330 (explaining that "[t]he application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory").

The court rejected petitioner's argument that the district court confused nepotism with race-based discrimination. The court pointed out that the evidence amply revealed that the policy caused the discriminatory impact because every new member was a relative of an existing white member. Pet. App. A23, quoting *Thomas* v. *Washington County Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990) ("when the work force is predominately white, nepotism and similar practices which operate to exclude outsiders may discriminate against minorities as effectively as any intentionally discriminatory policy"). The court rejected petitioner's business-necessity defense, finding that petitioner's "family tradition" justification bore no relationship to the business of steamship clerks. Pet. App. A26-A27, citing *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 659 (1989).

The court of appeals vacated most of the district court's judgment regarding remedy. The court ruled that, except for the injunction prohibiting further application of the membership policy, the district court erred in entering the remedial order without first giving the parties an adequate opportunity to be heard. Pet. App. A27-A33.

ARGUMENT

Petitioner asserts (Pet. 6-8) that the Commission failed to establish a prima facie case of disparate impact discrimination because it did not offer evidence of rejected applicants. Petitioner claims (Pet. 6) that the only evidence the Commission submitted was evidence of a significant racial imbalance in petitioner's membership. Petitioner contends (Pet. 4-14) that the court of appeals' decision conflicts with the Court's decisions in *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), and *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

The court of appeals made it clear that its affirmance and the district court's finding did not rest solely on figures showing a racial imbalance. Pet. App. A19, A21. Rather, those figures sprang from, and were "nestle[d] in a singularly compelling factual context," that is, nepotism by an all-white group.[6]

Evidence of rejected applicants is not an absolute prerequisite to a finding of causation under Title VII. In *Wards Cove*, the Court stated that Title VII plaintiffs must show "that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites." *Wards Cove*

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[6] Petitioner asserts that "[t]he court of appeals' observation that the sponsorship practice '*appeared* to operate nepotistically' * * * is not supported by findings by the district court." Pet. 10 n.5. On the contrary, the quoted statement is amply supported by the district court's findings, and, if anything, errs by understating them. The district court found: "The sponsored applicants were always members' relatives." Pet. App. A39-A40.

Packing Co. v. *Atonio*, 490 U.S. at 657.[7] In many cases alleging a disparate impact violation in a hiring process, the plaintiff can point to rejected applicants as evidence that the challenged practice has such a disparate impact on the employment opportunities available to his or her minority group. But as the court of appeals pointed out, Pet. App. A22, this Court and other courts have recognized that this will not always be possible because some obviously discriminatory practices discourage minorities from applying at all. See, e.g., *United States* v. *Sheet Metal Workers Int'l Ass'n, Local Union No. 36*, 416 F.2d 123, 127-132 (8th Cir. 1969) (when potential minority applicants know of the defendant union's discriminatory practices, plaintiff need not show that blacks applied and were rejected); cf. *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977) (rejecting requirement that plaintiff always demonstrate impact on actual applicants, since "otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory"); cf. *Wards Cove*, 490 U.S. at 655 n.9 (indicating that nepotism, if proven to exist, could be subject to challenge if it had a disparate impact on minorities).

When an all-white union, such as petitioner, has a policy of admitting only close relatives of current members, it would be futile for minorities to apply for

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[7] The less precise language from *Watson* on which petitioner relies (Pet. 5-6), spoke of plaintiffs having to prove that the challenged practice "caused the exclusion of applicants," *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. at 994. That passage appears in a section of Justice O'Connor's opinion joined by only three other Justices. Nor is the passage one of the portions of Justice O'Connor's opinion on which the *Wards Cove* Court later relied.

admission. In addition, where an all-white union, such as petitioner, has an application procedure that requires applicants to be introduced by a current member and precludes persons from walking in to apply, C.A. App. 142, 181, 184, potential minority applicants will rarely learn of the openings. *Thomas* v. *Washington County Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990) ("nepotism and word-of-mouth hiring * * * in the context of a predominantly white work force, serve to freeze the effects of past discrimination.").[8]

The district court's finding of disparate impact discrimination was based on the relevant labor pool data considered in the context of nepotistic hiring practices by an all-white union. Those practices resulted in the employment of only other whites over the course of several years. The court of appeals' affirmance of this decision is fully consistent with this Court's precedents. See, e.g., *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 349 n.32 (1977) (the predictable result of nepotism by an all-white union is "'to forever deny to negroes and Mexican-Americans any real opportunity for membership'") (quoting *Local 53 of the Int'l Ass'n of Heat & Frost Insulators* v. *Vogler*, 407 F.2d 1047, 1054 (5th Cir. 1969)); *Thomas*, 915 F.2d at 925 (nepotism "serve[s] to

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[8] None of the allegedly conflicting cases cited by petitioner (Pet. 12) involve nepotism by an all-white union or work force. The cases instead address employment practices such as tests, educational requirements, background questionnaires, subjective promotion decisions, and on-the-job training. Such practices, as the court of appeals pointed out, differ from nepotism in that they have "no inherently obvious tendency to discriminate against protected classes of individuals." See Pet. App. A21 n.12.

freeze the effects of past discrimination"); *Local 189, United Papermakers* v. *United States*, 416 F.2d 980, 989 (5th Cir. 1969) (nepotism by an all-white union has "the inevitable effect of assuring the lily-white status of the union for all time"), cert. denied, 397 U.S. 919 (1970).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] In some cases challenging nepotism by an all-white group, the defendant did not even contest the practice's discriminatory impact. See, *e.g.*, *Bonilla* v. *Oakland Scavenger Co.*, 697 F.2d 1297, 1303 (9th Cir. 1982) ("As the Company concedes, the [challenged nepotistic practice] * * * has a discriminatory impact on the Company's minority employees."), cert. denied, 467 U.S. 1251 (1984); *Local 53 of the Int'l Ass'n of Heat & Frost Insulators* v. *Vogler*, 407 F.2d 1047, 1050 & n.6 (5th Cir. 1969) (defendant union conceded that its nepotistic admission policy was discriminatory).